No. 89-1436

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

R. ENTERPRISES, INC. AND MFR COURT STREET BOOKS, INC.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER QUESTION PRESENTED

When a subpoena, seeking records related to activities protected by the First Amendment, is challenged by a substantial showing that the documents sought are unrelated to the criminal investigation, must the government then demonstrate that records demanded are "substantially" related to the grand jury investigation?

PARTIES TO THE PROCEEDING

In addition to the named parties, Model Magazine Distributors, Inc., (Model) was a party in the courts below.

Model has filed a cross-petition bearing #89-1606.

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The respondents, R. Enterprises, Inc., and MFR Court Street Books, Inc., respectfully request that this Court deny the Government's petition for a writ of certiorari that seeks review of the opinion of the United States Court of Appeals for the Fourth Circuit. *United States v. R. Enterprises, Inc. and MFR Court Street Books, Inc.*, 884 F.2d 772 (4th Cir. 1989) (App. 1a-15a).[1]

[1] Refers to the Government's appendix.

Preliminary Statement

Conspicuously missing from the Government's petition for certiorari is any acknowledgment that the activities of R. Enterprises and MFR Court Street Books, Inc., (MFR) are protected by the First Amendment. Such a serious omission makes their petition most suspect. The First Amendment aspect of the case, of course, casts quite a different light over the Fourth Circuit's holding and lends it strength.

The Court of Appeals merely held that where a book store in Brooklyn and a distributor of films in Manhattan have demonstrated through elaborate affidavits in a motion to quash that their records have no conceivable connection with Virginia (the district of the investigation) then, and only then, must a prosecutor "offer some evidence of a connection between MFR and R. Enterprises and Virginia before it can subpoena the company's business records under 17(c)." (App. 9a).

The circuit court was careful to point out that "[b]ecause the Government has offered no such evidence," the relevance of the subpoenaed records was not established under Rule 17(c). (App. 9a, 884 F.2d at 777). This holding is completely consistent with the law governing grand jury investigations, and is particularly appropriate in any case implicating First Amendment considerations. The loyalties traditionally shown the First Amendment make this case different from other more pedestrian grand jury investigations which don't involve First Amendment values. For these reasons the Government's petition for certiorari should be denied.

STATEMENT OF THE CASE

This case began in October of 1986, when a grand jury in the Eastern District of Virginia, investigating shipments of alleged obscene materials into Virginia, issued a subpoena to Model Magazine Distributors, Inc. (Model), calling for the production of virtually all of its video tapes and business records. Model's contempt conviction for failing to produce video tapes was reversed because the subpoena was over broad. A petition for rehearing was denied. (App. 19a-56a; 829 F.2d 1291; App. 16a-18a, 844 F.2d 202)[2] *(Model I)*

In October of 1986, because of the grand jury investigation, Model discontinued all sales of video tapes, paperback books, and magazines in Virginia. (13)[3] These materials constituted less than one percent of all of Model's business. (15, 16, 17, 23) Model's distribution of products to Virginia was discontinued not because it believed the materials were unlawful, but simply to avoid the legal expense of a continuing investigation. (13)

MFR and R. Enterprises Have No Connection to Virginia

Despite Model's discontinuation of business in Virginia, in April of 1988, the prosecutor struck again with a new wave of subpoenas, directed not only to Model, but

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[2] The Fourth Circuit did not reach the question of the relevancy of business records in this earlier case.

[3] The page references in this answer which have no letter designation refer to the page numbers of the joint appendix filed in the Fourth Circuit.

also to MFR and R. Enterprises. The subpoenas required the production of virtually all of the business records of each company before the Virginia grand jury. (App. 70a-74a; 79a-82a) In support of the motions to quash, MFR and R. Enterprises established the following:

MFR is a small retail bookstore located in Brooklyn, New York. (506) Occupying a small store on Court Street that is approximately 15 feet wide and 45 feet deep, it sells paperback books, magazines and video tapes to local customers, and has never engaged in any interstate business in Virginia. (62, 341-342, 496, 512). R. Enterprises is a New York corporation that does business under the trade name of "Coast-To-Coast Video" in Manhattan. (471, 508, 518, 519) It distributes video-tapes but it has *never* sold or shipped any video tapes to the State of Virginia. (342) MFR Books, R. Enterprises and Model are separate and distinct corporations and file separate corporate tax returns. (506, 637, 638)

The government petition claims that Mr. Rothstein admitted to an FBI agent that "R. Enterprises, MFR Books, and Model were all the same thing." (Gov. pet. p. 3) However, the prosecutor has omitted critical portions of the quotation of the FBI agent in an effort to make it sound as if Mr. Rothstein said that all three companies were engaged in the same business.[4] While Mr. Rothstein

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[4] The statement that the prosecutor relies on was allegedly made solely in the context of accepting service of the three subpoenas. Mr. Rothstein allegedly said:

> "It's all the same thing, I am the president of all three." (401)

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owned all three corporations, it is clear that these were three separate corporations engaged in completely different business activities.

Indeed the Government never produced any proof from any source – confidential informants or otherwise – that R. Enterprises, Inc. or MFR ever engaged in any business in Virginia. (620, 637-638) These facts, along with others, were developed in great detail in affidavits made in support of the motions to quash the subpoenas served upon both MFR and R. Enterprises. (342-3; 494-497; 506-510; 620; 637-639).

After such a strong showing of no connection between MFR and R. Enterprises and Virginia, counsel urged that before respondents should have to deliver all their records to a grand jury sitting in a far off jurisdiction the Government should make some showing of how the records are relevant to that investigation. The Government refused, stating that they are not obliged to make any showing of relevance whatsoever. The district judges agreed with them but the Fourth Circuit disagreed. The Court of Appeals properly interpreted the law governing subpoenas before grand juries.

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The fact that Mr. Rothstein was the president of all three for the purpose of accepting service of the subpoenas does not mean that all three entities were the same.

THE REASONS WHY THE WRIT SHOULD BE DENIED

The rule announced by the Fourth Circuit is consistent with an unbroken line of cases, extending over a long stretch of this Court's history. That rule, simply stated, is:

> When a subpoena, seeking records related to activities protected by the First Amendment, is challenged on the grounds that the documents sought are unrelated to the criminal investigation, the Government is obliged to make a showing that records demanded are "substantially" related to the grand jury investigation.

When a grand jury investigation impinges upon activities protected by the First Amendment, this Court has held that a prosecutor must show that there is "a substantial relation between the information sought and a subject of overriding and compelling state interest." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). In the *Branzburg* case the Court sustained the grand jury subpoena over First Amendment claims because the information sought related "directly" to the criminal conduct being investigated.[5] 408 U.S. at 701, 708.

This Court has consistently held that there can be no interference with the circulation of books or films unless there is a preliminary determination of obscenity reached by a judicial officer which "focus[es] searchingly on the

[5] In *Branzburg*, relied upon so heavily by the prosecutor, this Court was careful to point out: "The sole issue before us is the obligation of [appellants] to respond to grand jury subpoenas as other citizens do and to [produce documents] *relevant* to an investigation into the commission of a crime." 408 U.S. at 682. (Emphasis supplied).

question of obscenity."[6] Where a distributor of books and films contests a subpoena on the grounds that the records sought have absolutely no relationship to the criminal investigation, then the Government must make some showing of relevance. Such a demonstration need not be as stringent as that applied to First Amendment materials themselves. But certainly some showing of relevance must be made before such an expansive demand for documents is authorized.

In a similar situation the Ninth Circuit, in a well reasoned opinion, embraced this very principle. In *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), the court held that questions addressed to the identification of those persons responsible for the publication of a newspaper were barred absent a showing that there was a " . . . substantial possibility that the information sought will expose criminal activity."[7] 466 F.2d at 1083.

[6] *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Walter v. United States*, 447 U.S. 649 (1980); *New York v. P. J. Video*, 475 U.S. 868 (1986).

[7] In *Bursey* the Government's investigation involved an inquiry into persons responsible for the distribution of a newspaper. The investigation involved a suspected plan to assassinate the president of the United States. Nevertheless, the court there, in clear language, stressed:

> When Government activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and

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Judge Wilkinson, in his concurring opinion in the Fourth Circuit in *Model I*, stressed that where a grand jury subpoena is directed towards films presumptively protected by the First Amendment, then it must serve a "compelling state interest." (App. 50a.) And even where there is a compelling state interest, restrictions on the First Amendment can be no greater than is essential to further the Government interest and must be *"substantially* related to the investigation." 829 F.2d 1305, emphasis supplied, (App 50a, 51a). *Citing Branzburg v. Hayes*, 408 U.S. 665 at 705-706 (1972); *Bursey v. United States*, 466 F.2d 1059 at 1083 (9th Cir. 1972).

The threat of invoking legal sanctions, implicit in a grand jury investigation, is all the more reason why the subpoenas were properly quashed. A grand jury's power of investigation does not carry with it the wholesale authority to issue subpoenas for the records of a small bookstore in Brooklyn. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963). When such unwarranted investigations are launched into the realm of free expression, we have much to fear. Any assumption

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> compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests. 466 F.2d at 1083.

The *Bursey* court went on to emphasize:

> However, it [the Government] is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation. 466 F.2d at 1083.

that the probable failure of this grand jury investigation will amply vindicate the free circulation of adult materials is unfounded. For we know from experience that "the threat of sanctions may be deter . . . almost as potently as the actual application of sanctions. . . ." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

It would be unthinkable to suggest that a Virginia prosecutor could subpoena a bookstore in Minnesota without any showing of relevance. The fear of an indictment is certainly every bit as inhibiting as the subpoenaing of a few films or books. Judge Wilkenson acknowledged the inhibiting impact of the ad terrorem tactics of subpoenaing a distributor's films. (App. 48a) Once a subpoena is challenged because the records sought are unrelated to the grand jury investigation, the Government is obliged to illustrate how those records are connected to the inquiry.

What possible relevance can the records of a retail store in Brooklyn have to an investigation in Virginia? The simple answer must be that the law requires some demonstration that there is a basis for commanding a local bookstore in Brooklyn to produce all of its records before a grand jury in a far off jurisdiction. That is all that the Respondents suggest must be done.

No one is urging that the Respondent's records are immune from discovery because they are engaged in activity protected by the First Amendment. We urge that before they can be subjected to such official demands – that inevitably chill the exercise of free expression – there must be a substantial showing of how it is that the records of a bookstore in Brooklyn, or a distributor of

films in Manhattan, are relevant to a grand jury investigation in Virginia.[8] Certainly such a requirement does not impose an unbearable burden upon the Government and at the same time it affords the public the fundamental protections guaranteed by the First Amendment.

The Fourth Amendment Relevancy Requirement

Even if this case only implicated the Fourth Amendment, this Court has recognized that there must be some showing of relevancy before a demand for documents will be judicially condoned. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).[9] The rule followed in most jurisdictions provides that when the subject of a subpoena makes a motion to quash that process, asserting good-faith complaints concerning the

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[8] The federal venue statute and the Constitution mandate that a person must be indicted in the place where the crime is committed. In terms of obscenity, this requires that a person be indicted either in the place to which the shipment is made, or the place from which it is made, or any place through which the material travels. Therefore, a grand jury sitting in the Eastern District of Virginia could not indict for a shipment or for mailing within New York or between any northeastern states. 18 U.S.C. 3237; F.R. Cr.P. Rule 18; *United States v. Peraino*, 645 F.2d 548 at 551 (6th Cir. 1981); *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976); *United States v. Bagnell*, 679 F.2d 830 at 832 (11th Cir. 1982). (209-211; 346-349).

[9] In the *American Tobacco* case, this Court relying exclusively on the Fourth Amendment, held "(i)t is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope that something will turn up." 264 U.S. at 306. The powers of the FTC are analogous to those of a grand jury. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

matter of relevance, the Government is obliged to indicate how it is the records challenged are relevant to the investigation.

Such a circumstance is quite different from those cases where a subpoenaed witness merely alleges – in a negative way – that the Government has not demonstrated how the demand for his records is relevant to the investigation. One can easily understand in those cases how courts have concluded that the prosecutor need not affirmatively demonstrate relevance. But when a recipient of a subpoena *affirmatively* shows that there is no "conceivable connection" between records demanded and the inquiring state, then the prosecutor must make some showing of relevance. For instance in *Hale v. Henkel*, 201 U.S. 43 (1906), a subpoena *duces tecum* for all the company's business records was held to be unreasonable absent a Government showing of *relevancy*. *See also Federal Trade Commission v. American Tobacco Co.*, 264 U.S. at 306.

The cases relied upon by Government fully support the rule as we have defined it. For instance, this court was quick to acknowledge in *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) that there is "a relevancy" requirement imposed upon the powers of the Federal Trade Commission. Significantly this court analogized the Federal Trade Commission's power of inquisition "to the Grand Jury." (338 U.S. at 642) *United States v. Dionisio*, 410 U.S. 1 at 9-10 (1973) does stand for the proposition that the public has a right to every man's evidence. But, the quoted passage relied upon by the Government is preceded by the critical statement, "the powers of a grand jury *are not unlimited* and are subject to the supervision of a judge." 410 U.S. at 9. (Emphasis supplied.) If relevancy

is not a limitation on what can be compelled before a grand jury, then *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. at 306 has no meaning.[10]

And finally, *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327 (6th Cir. 1984) and *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978), relied upon by the Government, in reality support the "relevancy" requirement urged by the Respondents. For instance, *Battle* stands for the proposition that a party seeking to quash a subpoena bears the burden of establishing that "the information sought bears no conceivable relevance to any legitimate "investigation" and after such a showing, the Government must "make a minimal showing of relevancy of subpoenaed evidence." (748 F.2d at 330) And, the Second Circuit was careful to stress in *Liberatore*:

> "This is not to say, of course, that the grand jury is endowed with an absolute license to seek evidence not *relevant* to its investigative function, but we are only saying that the Government does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of a subpoena." (574 F.2d at 83, emphasis supplied)

The other circuit cases cited by the prosecutor are in the same vein. They fully support the Fourth Circuit's conclusion that once a recipient of a subpoena makes a detailed demonstration that the records have no

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[10] *Blair v. United States*, 250 U.S. 273 (1919) involved the question of jurisdiction not relevancy. There the witnesses challenged the jurisdiction of the grand jury and not the relevancy of their testimony.

"conceivable" relationship to the grand jury investigation, then the prosecutor must make a showing of how the records demanded are related to the investigation before enforcement of the subpoena will be granted.

And of course it bears repeating that when the subject of the grand jury investigation is engaged in activity that is protected by the First Amendment, the obligations imposed upon the Government are all the greater. For instance, this Court's decision in *Stanford v. Texas*, 379 U.S. 476 (1965), holding that the First Amendment requires that the Fourth Amendment be applied with "scrupulous exactitude," is most compelling. As a consequence, the Government in this case should be held to an even higher standard when the Respondents attack the subpoenas under the Fourth Amendment and the First Amendment.

In addition, there is a well-established colony of cases that require a showing of compelling Governmental interest before the production of business records of an enterprise engaged in First Amendment activities can be enforced and holds that justifiable goals may not be achieved by unduly broad means. In addition, the right to publish and distribute unpopular literature guaranteed by the First Amendment protects publishers, distributors, their employees and their suppliers and customers from inquiry concerning their identity in cases where there is no showing of a compelling need. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963); *Bursey v. United States*, 466 F.2d at 1085; *People v. Mishkin*, 17 A.D.2d 243, 234 N.Y.S.2d, 342 (1st Depart. 1962) aff'd 15 N.Y.2d 671, 255

N.Y.S.2d 881 (1964); *Natco Theaters Inc. v. Ratner*, 463 F. Supp. 1124 at 1132 (S.D.N.Y. 1979).

The presiding spirit of the "anonymity case law" supports the position of the Respondents. The production of the names and addresses of all its employees, suppliers and customers is unauthorized unless there is some showing that the grand jury is investigating, for instance, paperback book dealers in New York City or video stores in Yonkers, New York. It should be emphasized that the potential deprivation of First Amendment rights is *per se* irreparable without regard to any economic loss. For this additional reason, the Court should deny the Government's petition for certiorari.

And finally, it must be said that no one questions a prosecutor's right to investigate the distribution of allegedly obscene materials. Respondents claim no immunity from such an inquiry. All that is asked is that such an inquisition be conducted in a manner compatible with the constitutional requirements of the Fourth and First Amendments. In this way, a judge can preliminarily determine the necessity of the restraints imposed upon a seller of books and videotapes and can decide whether the invasion of privacy is warranted. Such a procedure protects the public from unwarranted deprivation of information and yet guarantees to the prosecutor the right to continue an investigation which may be legally justified. Once a court makes a determination that there is or is not justification, we have the satisfaction of knowing that the inquisition has "operated under judicial superintendence," with the assurance of "an almost immediate judicial determination of the validity of the restraint." *Bantam Books v. Sullivan, supra*, 372 U.S. 58 at 70 (1963)

To summarize our case in a few words, there is no way a federal prosecutor can possibly justify requiring Respondents to produce their records before a grand jury sitting in Virginia, for all those records relate to the distribution of presumptively protected literature outside of Virginia. Not only is this action unauthorized, but it will impose an impermissible prior restraint on the distribution of books and films to a public outside the confines of the Eastern District of Virginia.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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May 14, 1990